STATE OF WISCONSIN
COURT OF APPEALS
DISTRICT II

STATE OF WISCONSIN,

Plaintiff-Respondent,

vs.

Appeals Case No.: 2015AP000994 - CR
Case No.: 2013CM000228

TRISTA J. ZIEHR,

Defendant-Appellant.

ON APPEAL BY THE DEFENDANT-APPELLANT, TRISTA J. ZIEHR, FROM FINAL ORDERS AND JUDGMENT IN THE CIRCUIT COURT FOR OZAUKEE COUNTY, THE HONORABLE JOSEPH VOILAND, PRESIDING

BRIEF AND APPENDIX OF DEFENDANT-APPELLANT

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STATEMENT ON ORAL ARGUMENT AND PUBLICATION

The defendant-appellant, Trista Ziehr does not believe that oral argument is necessary, since the argument is fully developed in this brief. The defendant does request publication of the Court's decision, since the decision can clarify the elements of offense under § 48.981, and reporter immunity under § 48.981(4).

STATEMENT OF THE ISSUES

1. Was the real case in controversy fully tried without probability that justice has, for any reason, miscarried?

Answer by the Trial Court: Yes.

2. Does the law allow for a reasonable amount of time to verify a child's allegations of sexual misconduct prior to its required report under Wis. Stat. § 48.981?

Answer by the Trial Court: No.

3. Is a reporter under Wis. Stat. § 48.981(4) immune from criminal liability if they have either (1) caused the appropriate authorities to be notified of the alleged abuse, or (2) reasonably believed that the appropriate authorities had already been notified by a third person?

Answer by the Trial Court: No.

4. Was the evidence presented at trial sufficient to support that Ziehr had reasonable cause to suspect that child abuse occurred?

Answer by the Trial Court: Yes.

5. Does the joining of two or more separate offenses in a single count of the Complaint violate the prohibition against duplicity?

Answer by the Trial Court: No.

6. Was "other acts" evidence of Ziehr's alleged failure to report other suspected abuse properly admitted at trial?

Answer by the Trial Court: Yes.

STATEMENT OF THE CASE

I. Procedural Background.

On April 29, 2013, the defendant-appellant, Trista Ziehr (hereinafter "Ziehr"), was charged with one count of failure to report child abuse between March 1, 2013, and April 3, 2013, in violation of Wis. Stats. §§ 48.981(2) & 48.981(6). (R. 1). The charges were based upon an allegation that Ziehr failed to report the suspected abuse of JV by her son, PZ, at the Family Tree Learning Center—a daycare center owned by Ziehr, but licensed to Kim Berens. *Id.* The Complaint alleged that the incident, occurred "a few weeks before," it was reported to police by JV's mother, on April 10, 2013. *Id.*

At her initial appearance on May 1, 2013, Ziehr was released on a $1,000.00 signature bond with various conditions. (R. 4). Ziehr remained free on a signature bond and complied with the requirements of the bond throughout pretrial proceedings and trial.

On June 3, 2013, the State filed an Amended Criminal Complaint. (R. 11). The defendant's date of birth was corrected. *Id.*

On April 7, 2014, Ziehr filed a Motion in Limine seeking to exclude evidence of PZ's potentially inappropriate conduct towards other children. (R. 31); (R. 32). In the State's Response to Defendant's Motion in Limine, the State communicated that testimony related to incidents of conduct between PZ and another child, AM, was "central to the State's prosecution of this case and substantially changes the nature of the case from that which it was originally prepared." (R. 34). The State went on: "[s]hould the Court refuse to accept the State's amendment" (apparently the second Amended Complaint filed eight-months later), "and grant the defense's petition, the State will subsequently ask the Court to voluntarily dismiss this criminal complaint and re-file the identical matter within 48 hours." (R. 34). The court never responded to Ziehr's motion.

Approximately, eight-months later (April 8, 2014), the State filed a (second) Amended Complaint. (R. 35). The (second) Amended Complaint added allegations that Ziehr had failed to report PZ's suspected abuse of a second child at the daycare, AM, "on or about the later half of March 2013." (R. 35).

A Status Conference was held on June 30, 2014 setting the matter for trial. *See* (R. 112). At that time, the parties requested a date to hear their to-be-filed motions. *Id.* The court set a Scheduling Order, and required the State to file a response to the defendant's motions by August 21, 2014. (R. 112: p. 8).

On July 21, 2014, Ziehr filed "Defendant's Motion in Limine for Decision on Applicable Jury Instructions for Trial." (R. 44). Ziehr's proposed substantive jury instruction modified the standard instruction to provide: (1) that a defendant is entitled to expend a reasonable amount of time to investigate and verify a child's allegation of abuse prior to reporting; (2) that once the defendant caused the appropriate authorities to be notified, her reporting requirement was satisfied; and (3) that the defendant need not make such a report if she reasonably believed that the authorities had already been notified by a third person. App. F, p. 21–22; *See Phillips v. Behnke*, 192 Wis.2d 552, 562 (Ct. App. 1995). The State filed no response to the defendant's Motion in Limine.

A final pretrial hearing was held on September 22, 2014, and in a prequel to later hearings, the hearing resolved little. *See* (R. 120). The State, having filed no response to the defendant's motion, was asked to comment on the applicable jury instructions under *Behnke*. *See* (R. 120). The prosecutor stated:

> As to the motion, you know, candidly I think if –I think it's more of an element to the offense as far as something that's the subject to a motion. I think the concept is, you know, perhaps goes to knowledge. I don't know. The problem is that it's submitted in the form it is in essence it becomes a nullification argument saying she believed that somebody else had done it so she didn't have to do it so nullify it.
>
> I understand the civil context that it might be relevant, other things certainly might be relevant to damages. And here it might certainly be very relevant to penalty. Together with other aspects of this case that I think are in the defendant's favor. Because I think this case is unique in that it would, in essence force a mother to turn in her child. And that's a unique aspect as well. But that's all I have to say, Judge.

(R. 120: p. 3)

In response to the State's argument, the court suggested that it could not make a ruling because the question was fact specific. (R. 120: p. 3–4). Defense informed the court that based upon conversations with the prosecutor, if the court granted the Defendant's Motion in Limine the State intended to dismiss the case. (R. 120: p. 4–5). The court maintained that the instruction is fact specific and cannot be ruled upon at this time. (R. 120: p. 6). After further argument by the defense, the court requested further input from the State. The prosecutor stated:

> Judge, if the Court interprets Behnke to require reasonable investigation before reporting and provides, you know, fleshes out the temporal aspect of how long that can be and the court can take it away and not submit it to the jury, that's the reality of the –of this case. Because candidly there's – the part I would concede is on the proof that we have and Mr. Schiro's proof, he's shared it with me, he's been very kind with me, there's not a great deal of time in one respect. There's not a great deal of time.

(R. 120: p. 10–11). After further argument by the State (which is difficult to summarize or understand), the court suggested that perhaps the statute was meant to require reports from multiple people. (R. 120: p. 13). The State then suggested that if the court instructs the jury that the defendant is entitled to a reasonable investigation prior to reporting, then it cannot sustain its burden.

> So if the Court does provide an instruction that says 48.981 requires some reasonable amount of time for an individual to – when information is reported to investigate the facts, and then leave to the jury what that reasonable amount of time is, then we're arguing about reasonable amount of time. And, frankly, I don't have much of an argument.

(R. 120: p. 16). The court then reiterated that it will not decide on the jury instruction until after the close of the State's evidence.

> ... and I think that is why there are motions at the close of the State's evidence. And it might be that at the close of the State's evidence then what Mr. Gerol indicates, well, maybe you should take it away at that time. In other words, you, me, the Court should grant you a judgment as a matter of law at that time. That's my take of what Mr. Gerol is saying. But without any facts in the record I don't think that I can tell you right now. Certainly the second part of your jury instruction about what happened on what day. And I think – I just think it's a jury question. And in terms of the amended complaint I don't think it's duplicitous.

(R. 120: p. 19). Defense counsel again requested that the court make a ruling regarding "...what the elements of this offense are. We can't wait til the close of the State's case to find out what you think about this". (R. 120 p. 20). The court then decides that it will make a ruling and that "...I'm not going to give you a special jury instruction. I am not going to change the jury instruction." *Id.*

Ziehr also maintained that the State's (second) Amended Complaint was duplicitous and maintained two separate incidents in support of one criminal charge. (R. 120: p. 8–10). The State responded that both the PZ-JV and the PZ-AM incident were part of the same continuing violation of Ziehr's duty to report. (R. 120: p. 25). The trial court found that inclusion of both the

PZ-JV and PZ-AM incident in the State's (second) Amended Complaint was not duplicitous. *Id.*

On October 3, 2014, Ziehr filed a Motion to Dismiss the (second) Amended Complaint. (R. 54).The Motion alleged that the Complaint failed to adequately inform Ziehr of the time of the commission of the offense and that such a broad 34-day timeline was unconstitutionally duplicitous since the crime for which she was being prosecuted required that she "immediately" report such abuse. Therefore, the Complaint precluded Ziehr from preparing a defense and from being free of potential double jeopardy concerns upon conviction or acquittal. Based upon these same concerns, Ziehr also filed, at that same time, a Motion for a Bill of Particulars, and a Motion to Make More Definite and Certain. (R. 52); (R. 53).

On October 10, 2014, the court issued an "Order Regarding Pre-Trial Filings." (R. 57). The court's order reaffirmed the trial date of October 30, 2014, and, rather than ruling on Ziehr's Motion for Bill of Particulars, Motion to Make More Definite and Certain, and Motion to Dismiss, the court merely ordered the State to respond to the Ziehr's motions on or before October 21, 2014—nine days before trial. *Id.* The court again reaffirmed its rejection of Ziehr's proposed jury instructions from the September 22, 2014, hearing based upon an Indiana case, *Smith v. Indiana*, 8 N.E.3d 668 (Ind. 2014). *Id.*

On October 23, 2014, two days after the State was ordered to respond to Ziehr's motions, and without otherwise responding to her motions, the State filed a Second (third) Amended Criminal Complaint. (R. 64). The Complaint changed the time of the commission of the crime to the period "between March 20, 2013–March 25, 2015. *Id.* The Complaint goes on, however, to reference an alleged assault of **AM** as well as an assault involving (again) **JV**. *Id.* (emphasis added). The Complaint fails to indicate which incident (the incident involving AM or the incident involving JV), was the incident which the defendant allegedly failed to report. *See Id.*

Ziehr filed a (second) Motion in Limine on October 24, 2014, which requested that the State be prohibited from introducing evidence concerning any alleged misconduct committed by Ziehr either prior to, or following, the date of the offense charged in the Complaint. (R. 66).

Ziehr also filed a (second) Motion to Dismiss the State's Second (third) Amended Criminal Complaint on October 24, 2014, regarding a misstatement of facts in the probable cause section of the State's Complaint. (R. 65).

On October 27, 2014, Ziehr filed a Second (third) Motion to Dismiss Second (third) Amended Criminal Complaint. (R. 71). Ziehr argued that the State was still charging one failure-to-report count based upon "two different events involving different minors at different times and under wholly different circumstances." *Id.* Ziehr requested that the duplicitous information be stricken from the Second (third) Amended Complaint. *Id.*

On the morning of trial, Ziehr implored the court to make rulings on the various motions filed by the defense. (R. 122). Up to this point, the court had not ruled on, nor had the State responded to, Ziehr's Motion in Limine, Motion to Dismiss, Motion for a Bill of Particulars, Motion to Make More Definite and Certain, (second) Motion to Dismiss the State's Second Amended Criminal Complaint, Second (third) Motion to Dismiss Second Amended Criminal Complaint, and (second) Motion in Limine—and utter chaos ensued. (R. 122: p. 11–12).

Five issues raised in Ziehr's motions were decided the morning of trial: (1) when did Ziehr allegedly fail to report child abuse; (2) which of the State's two failure-to-report allegations against Ziehr was being charged and going to be tried; (3) whether the State's complaint was duplicitous; (4) was Ziehr entitled to an immunity instruction under Wis. Stat. § 48.981(4) and *Behnke*; and (5) whether the State's complaint should be dismissed for misstating facts. A sixth issue: whether other "failure-to-report" allegations should be admitted as "other acts" evidence, was also raised, addressed, and ruled upon, even though the State had never filed any document seeking to introduce "other acts" evidence, never identified what that evidence would be, and never disclosed the basis for the request. To the contrary, the State had always alleged this to be a continuing crime. (R. 120: p. 25); (R. 122: p. 5, 7).

At trial, the court read the standard Criminal Jury Instruction 2119, and gave a limiting instruction as to the PZ-JV incident. (R. 122, p. 355–56). The jury subsequently found Ziehr "guilty of failure to report child abuse, as charged in the complaint." (R. 122, p. 387).

On December 8, 2014, the circuit court sentenced Trista Ziehr to 30 days in jail. (R. 87, 88, 89). Ziehr filed a Notice of Intent to Pursue Post-conviction Relief pursuant to Wis. Stat. § 809.31 on December 9, 2014. (R. 89).

Ziehr filed a motion for Stay and Release Pending Appeal on December 9, 2014, pursuant to Wis. Stats. § 809.31(1). (R. 90). The State did not oppose the motion.

On December 12, 2014, the court denied Ziehr's request for Stay and Release Pending Appeal. (R. 92). During the hearing, the court noted that while a hearing was required, he had already prepared a written decision denying a stay pending appeal which he would give the parties **after** the hearing. *See* (R. 92); (R. 124) (emphasis added). The hearing did not address issues described in the written decision. *Compare* (R.124: p. 5–6); *with* (R. 92).

On December 18, 2014, Ziehr filed an Emergency Unopposed Motion for Stay of Sentence Pending Appeal. (R. 95). On December 22, 2014, the Wisconsin Court of Appeals reviewed and reversed the circuit court's order denying Ziehr's release on bond pending post-conviction relief. (R. 97).

Notice of Appeal was filed with the Circuit Court of Ozaukee County on May 14, 2015. (R. 101).

II. Statement of Facts.

On March 20, 2013, AM, a four-year old child who attended the Family Tree Learning Center, poked his head out from underneath a blanket after his nap and said PZ "said you were going to give me a quarter if I slept good." (R. 122: p. 144). AM then said "suck a penis, touch a penis." (R. 122: p. 138, 144). Christina Gould, to whom AM was speaking, was a daycare worker at the Family Tree Learning Center, and was supervising children in that particular room. (R. 122: p. 137–138, 145, 303–304). Gould called Ziehr, PZ's mother, to relate what happened. (R. 122: p. 138–139, 305).

Gould informed Ziehr what AM said, and made no reference as to any inappropriate contact between PZ and AM. (R. 122: p. 138, 305, 307). Ziehr responded that she was on her way back to the daycare, and would talk to AM when she got back. (R. 122: p. 138). Ziehr came back to the daycare, pulled AM aside, and spoke with him. (R. 122: p. 140, 308–309). AM confirmed the substance of Gould's account and elaborated that he needed quarters for the book fair because his mom and dad did not have money for the book fair. (R. 122: p. 308–309). AM related that PZ told him that he would get quarters if he slept good. *Id.* Ziehr told Gould to tell AM's grandmother, who was picking AM up from daycare, what happened. (R. 122: p. 309).

That night, Ziehr received a telephone call from AM's father asking about the incident. (R. 122: p. 309). Apparently, AM told his parents that PZ bribed him to touch PZ's penis. Ziehr stated that she would have Gould call AM's father. (R. 122: p. 309–310). Gould called and told AM's father that it was impossible that PZ and AM could have been doing anything sexual because she was in the room and would have observed it. (R. 122: p. 147, 310).

Gould called Ziehr back, and informed Ziehr that she had spoken to AM's father, and that he was not very nice to her on the phone. (R. 122: p. 310). Evidently AM's father screamed at Gould: "don't lie to me. Nobody was in the room when this happened. You guys know something happened so don't cover it up." (R. 122: p. 243). That night, after Gould hung up with AM's father, Ziehr heard nothing back from the AM family. (R. 122: p. 310).

Thus, after speaking with Gould, AM, and PZ, Ziehr had no evidence of any inappropriate conduct. (R. 122: p. 310–313). There was no talk of abuse. (R. 122: p. 310). In fact, AM was known for the occasional use of the word "penis" at daycare ever since AM's brother had penis surgery. (R. 122: p. 311). Ziehr concluded AM's statement was simply "potty talk" consistent with AM's occasional language in the past, and did not contact police. (R. 122: p. 310).

The next morning, AM's mother informed Ziehr via text that AM told her that he had to see PZ to get his money. (R. 122: p. 312). In the same text, AM's mother informed her that she had officially reported the incident. (R. 122: p. 312) ("the boys will not be there today. Also wanted you to know **I had to report what happened yesterday**. AM again woke up this morning and told me he needed to see PZ to get his money.") (emphasis added); *see also* Trial Exhibit 8. On March 24, 2013, Detective Vahsholtz called Ziehr and asked her to bring her son in for questioning. (R. 122: p. 188, 313–314). On March 25, 2013, Ziehr brought PZ down to speak with Detective Vahsholtz. (R. 122: p. 188, 314). Detective Vahsholtz questioned PZ, and Ziehr opted to give them privacy and sat in the waiting room. (R. 122: p. 188–189, 315). On March 25, 2013, Ziehr subsequently aided in a state investigation regarding the incident. (R. 122: p. 315–316).

Several weeks later, on April 9th, 2013, Ziehr received a text message from Sara Vite, the mother of another child, JV. (R. 122: p. 318). JV also attended the Family Tree Learning Center. Sara called Ziehr and told her that JV told her that PZ wanted to touch tongue-to-tongue. (R. 122: p. 319–320). Sara also spoke with Kim Berens, the daycare licenseholder, regarding the incident. (R. 122: p. 321). Kim texted Ziehr and told her that JV's father was going to call the police. (R. 122: p. 322). Kim and Ziehr agreed that Kim would report the incident that next morning—April 10, 2013—and did so. (R. 122: p. 322–323).

Ziehr was subsequently charged with failing to report suspected PZ-JV child abuse, which occurred at some point between March 1, 2013, and April 3, 2013. The State's three later amended complaints, however, added other allegations regarding PZ-AM abuse. While suspected PZ-AM abuse occurred between March 20–25, 2013, it remains uncertain when the other, suspected

PZ-JV abuse, occurred. Ziehr filed numerous motions in an attempt to clarify which allegation she was accused of. Apparently six issues, five of which were raised in Ziehr's motions, were "up for grabs" the morning of trial.

On trial morning, discussion began with argument over when exactly the State was alleging that Ziehr failed to report suspected child abuse. (R. 122: p. 4). Despite a one-count charge, the State evidently believed that Ziehr should have reported on March 20, 21, 22, 23, and 24, 2013, and was in "continuing violation" of a duty to immediately report. (R. 122: p. 5, 7). One can, however, only fail to "immediately" report once. The court told the State "[t]here's only one count. She's not being charged again for March 22nd, 23rd, 24th. You're charging her for one failure to report. And you believe the evidence is going to show that by March 21st she should have done so." The State now all-of-a-sudden agreed with the judge. (R. 122: p. 7). Without any definitive resolution or consensus, the court abruptly changed the subject. (R. 122: p. 8).

The court went on to examine whether the law provided Ziehr a reasonable opportunity to investigate and confirm suspected child abuse prior to reporting. *See* (R. 122: p. 8); (R. 44). However, before the parties had a chance to respond, the court brusquely changed the subject again. (R. 122: p. 8–9).

Discussion began as to why the State's complaint was duplicitous. *See* (R. 122: p. 9). The court believed that separate PZ-AM and PZ-JV incidents were not "about any different victim." (R. 122: p. 10). The court concluded that two different incidents, which occurred at two different times, with two different victims could be introduced to support a one-count complaint. (R. 122: p. 10, 14–15). The court added: "no one is prejudiced by this" because "it's about the same people. It's about the same events." (R. 122: p. 23).

Thereafter, an exchange occurred over whether the jury was going to be asked to decide if Ziehr failed to report only the PZ-JV incident, only the PZ-AM incident, or either-or. (R. 122: p. 24). According to the State, the "court could elect" or the State "would elect" to just try the PZ-AM incident. (R. 122: p. 25). Of course, the State knew that Ziehr had reported the PZ-JV incident via Kim Berens the morning after JV's mother informed Ziehr of what had occurred. That's why, on the day of trial, the State "elected" to try the later-added PZ-AM incident. After some prompting by the court—asking the State to **"close the loop"** on how the PZ-JV incident was "other acts" evidence—the State switched gears. (R. 122: p. 26) (emphasis added). The PZ-JV incident

was no longer a part of Ziehr's "continuing violation" to report, but instead, according to the State, "probably is other acts evidence."[1] (R. 122: p. 26).

The discussion again abruptly shifted to whether Ziehr was entitled to a jury instruction regarding reporter immunity under Wis. Stat. § 48.981(4) and *Behnke*. (R. 122: p. 27); *Phillips v. Behnke*, 192 Wis.2d 552, 562 (Ct. App. 1995). The court found that because *Indiana's* statutory goal is to "encourage more reports and not fewer reports," Ziehr was not entitled to a reporter immunity instruction. (R. 122: p. 28); *see Smith v. Indiana*, 8 N.E.3d 668 (Ind. 2014). The court then turned to discuss what other jury instructions were necessary for trial. (R. 122: p. 28).

The court decided that the jury would be instructed only as to Ziehr's failure to report the PZ-AM incident. (R. 122: p. 30). The court then, *sua sponte*, and without any comment from Ziehr, went on to rule that the PZ-JV incident was "other acts" evidence not for the purpose of "intent and absence of mistake" as the State purportedly suggested, but because "knowledge really is the purpose." (R. 122: p. 31). The court digressed that while it isn't the case here, the **"State may come in and say" that Ziehr is a "bad person. She's committed other crimes. You just shouldn't believe her. You should find her guilty regardless of what the evidence—other evidence is."** (R. 122: p. 31) (emphasis added). Without further delay, the court conducted an entirely unaddressed, unbriefed, and uninformed *Sullivan* "other acts" analysis. (R. 122: p. 31–32); *see State v. Sullivan*, 216 Wis. 2d 768, 781 (1998). The court concluded that the PZ-JV incident was admissible to show (1) Ziehr's "knowledge," (2) "that the evidence was relevant because it was probative to the extent that its value substantially outweighs the danger of unfair prejudice," and (3) because it was "directly related to the question before the jury of did she have reasonable cause to suspect abuse." *Id.*

Ziehr's (second) Motion to Dismiss the State's Second (third) Amended Criminal Complaint was thereafter addressed. The State's (third) Amended Complaint misleadingly stated that daycare-employee Christina Gould heard AM say "something to the effect about touching PZ's penis." (R. 64). This is simply untrue. Gould stated that upon waking from nap time, AM told her that PZ "said you [Gould] were going to give quarters if you slept good." (R. 65; p. 2). Only then did AM say "suck a penis, touch a penis." *Id.* The court found that this mistaken fact did not have any effect on the State's probable cause and denied Ziehr's motion.

[1] This, on the morning of trial.

ARGUMENT

I. THE REAL CASE IN CONTROVERSY WAS NOT FULLY TRIED AND JUSTICE HAS BEEN MISCARRIED.

a. Standard of appellate review.

The Court of Appeals has a "broad power of discretionary reversal" pursuant to Wis. Stat. § 752.35 "which provides authority to achieve justice in individual cases." *State v. Davis*, 337 Wis. 2d 688, 694–95 (2011); *see Vollmer v. Luety,* 156 Wis.2d 1, 19 (1990). That power may be exercised "where it appears from the record that the real controversy has not been fully tried, or if it is probable that justice has for any reason miscarried." Wis. Stat. § 752.35. The Court of Appeals may also exercise this power "without finding the probability of a different result on retrial that the real controversy has not been fully tried." *See State v. Hicks,* 202 Wis.2d 150, 160 (1996).

b. Pretrial chaos and conflation of issues merits discretionary reversal because the real controversy has not been fully tried, and justice has been miscarried.

Utter confusion and uncertain resolution of multiple issues raised in Ziehr's prior motions on the morning of trial is fundamentally unfair and merits reversal. The State's duplicitous complaint left Ziehr in no position to defend against the State's sudden "election" to try one of the two allegations in the State's complaint. Ziehr had no notice that the State intended to introduce the PZ-JV incident as "other acts" evidence, nor did Ziehr have any say as to whether it should be excluded. Despite Orders requiring the State to respond to the defendant's motions, and despite having provided a scheduling order directing the time for briefing, the State never responded to Ziehr's motions. It appears that, had Ziehr not insisted that motions be heard on the morning of the trial, the court was prepared to simply ignore all the legal issues raised by Ziehr and let the State proceed as it wished, including allowing the state to argue that Ziehr is a "bad person" and therefore she should not be believed (apparently based upon some "other acts" analysis). Because of such pretrial confusion, ambiguous resolution of the issues, and improper conflation of the PZ-JV and PZ-AM incidents, the real controversy has not been fully tried, and it is highly probable that justice has been miscarried.

II. THE CIRCUIT COURT FAILED TO FULLY AND FAIRLY INSTRUCT THE JURY REGARDING APPLICABLE LAW.

a. Standard of appellate review.

The trial court "must exercise its discretion to 'fully and fairly inform the jury of the rules of law applicable to the case and to assist the jury in making a reasonable analysis of the evidence.'" *State v. Fonte*, 281 Wis.2d 654 (2005) (citing *State v. Coleman*, 206 Wis.2d 199, 212 (1996)). "[I]f the jury instructions, as a whole, misled the jury or communicated an incorrect statement of law" and the "substantial rights" of a litigant were affected, a new trial is necessary. *State v. Laxton*, 254 Wis.2d 185 (2002); *Nommensen v. American Cont'l Ins. Co.*, 254 Wis. 2d 132 (2001).

For an error "to affect the substantial rights of a party, there must be a reasonable possibility that the error contributed to the outcome of the action or proceeding at issue." *Green v. Smith & Nephew AHP, Inc.*, 245 Wis.2d 772 (2001); *State v. Dyess*, 124 Wis.2d 525, 543, 547 (1985). A reasonable possibility of a different outcome is a possibility sufficient to "undermine confidence in the outcome." *Dyess*, 124 Wis.2d at 544–45.

The Court of Appeals will "independently review whether a jury instruction is appropriate under the specific facts of a given case." *State v. Jensen*, 306 Wis.2d 572, 581 (2007).

b. The Rule of the Case Doctrine and Rule of Lenity required the court to instruct the jury consistent with Wisconsin Court of Appeals' decision in *Phillips v. Behnke*.

The Wisconsin Court of Appeals decision in *Phillips v. Behnke* interprets the precise statutory language at issue in this case. *Phillips v. Behnke*, 192 Wis.2d 552, 562 (Ct. App. 1995). As such, *Behnke* is the controlling law and the circuit court was required to instruct the jury consistent with the appellate court's decision. Moreover, "a decision on a legal issue by an appellate court establishes the law of the case, which must be followed in all subsequent proceedings in the trial court or on later appeal." *State v. Stuart,* 262 Wis. 2d 620, 633 (2003).

The statutory construction of Wis. Stat. § 48.981, as interpreted in *Phillips v. Behnke* by the Wisconsin Court of Appeals, governs this case. In *Behnke*, the Behnkes' twelve-year-old daughter alleged that her teacher, Reginald Phillips, had sexual contact with her in a classroom. *Behnke,* 192 Wis. 2d at 557. The Behnkes conducted an investigation into the suspected

sexual contact, and eventually reported that investigation to the school district administrator. *Id.* Prior to reporting, the administrator conducted his own investigation into the allegations, and interviewed other students to substantiate the claims against Reginald. *Id.* The administrator ultimately reported the allegations to county social services. *Id.* As a result, Reginald lost his teacher's license. *Id.* at 558.

The Phillips thereafter filed a complaint against the Behnkes, the school district administrator, and their insurance companies, for making false allegations that Reginald engaged in sexual misconduct. *Id.* On appeal, the Court of Appeals of Wisconsin found that the Behnkes' and the administrator's "decision to conduct a preliminary investigation prior to reporting the allegations was consistent with the statute's requirement that the information be reported immediately." *Id.* at 565. As a result, the appellate court upheld the trial court's determination that the Behnkes were entitled to immunity under Wis. Stat. § 48.981(4) "because they reported the necessary information to one who was expected to, and did, report the information to the proper authorities." *Id.* at 561.

The court reasoned that because the allegations of improper sexual behavior "is extremely damaging both to the individual's reputation and career. . . . investigating the reasonableness of one's belief prior to making a report is proper and does not deprive the individual of immunity." *Id.* at 562. The court found that both the Behnkes and the administrator "conducted an investigation into the allegations made by the Behnkes' daughter and, after concluding that there was reasonable cause to suspect that Reginald touched her in an improper manner, immediately reported the allegations." *Id.*

The court provided an example as to why Wis. Stat. § 48.981, interpreted as only providing immunity to a direct reporter, was absurd:

> [I]f five school teachers obtained information that would require reporting under the statute and agreed that one of them would report the information, the teacher who actually reported the information would receive immunity. The other teachers, however, would be deprived of immunity under the statute, despite the fact that they determined a report should be made and designated a reporter. Certainly the legislature did not intend to create such an absurd result.

Behnke, 192 Wis. 2d at 561.

Accordingly, *Behnke* accurately reflects the hazards Ziehr and similarly situated mandated reporters face when attempting to reconcile immediate reporting with reality. On the one hand, if a mandated reporter

attempts to verify allegations, a failure to "immediately" report results in potential criminal charges under Wis. Stat. § 48.981. But on the other hand, if a mandated reporter makes a report absent verification, that reporter may be subject to civil liability for false reporting. Fortunately, *Behnke* establishes that Wis. Stat. § 48.981 clearly mandates verification over unsubstantiated reporting.

To the extent that Wis. Stat. § 48.981 may be considered ambiguous, the statute must be interpreted in Ziehr's favor as prescribed by the Rule of Lenity. *See State v. Cole*, 262 Wis. 2d 167, 174 (2003); *State v. Kittilstad*, 231 Wis. 2d 245, 267 (1999). If Wis. Stat. §48.981 shields a civil defendant from liability when a third party reports the abuse after reasonable investigation, it most certainly protects a criminal defendant from the same such prosecution.

Notwithstanding *Behnke's* clear policy determination, the circuit court here—relying upon an Indiana case—makes a quite contradictory determination. (R. 57: p. 2); *Smith v. Indiana*, 8 N.E.3d 668 (Ind. 2014). Apparently Ziehr was not entitled to jury instructions informed by *Behnke* because the "[Indiana Legislature] has made the risk arising from an unsubstantiated report, . . . secondary to the statutory scheme's overall aim of promoting more reports, not fewer, . . ." (R. 57: p. 2); *Smith v. Indiana*, 8 N.E.3d 668 (Ind. 2014). This might be true if we were in Indiana, but we are in Wisconsin. Wisconsin law holds that unsubstantiated reporting "is extremely damaging both to the individual's reputation and career" and therefore, "expending a reasonable amount of time to verify . . . is consistent with the statute's requirement that such information be reported immediately." *Behnke*, 192 Wis.2d at 562.

In further support of its decision, the trial court cited the failure of the committee to change 2119 after Behnke.[2] (R. 57). Yet, it is unclear whether the Criminal Jury Instructions Committee has even considered *Behnke* in either of their 2002 or 2011 revisions. Wis. JI-Criminal 2119. In fact, Comments to Criminal Jury Instruction 2119 bear no reference to *Behnke* whatsoever. Wis. JI-Criminal 2119. The Jury Instructions Committee's decisions, rationale, and conclusions are merely "persuasive" authority. *See State v. Wille*, 299 Wis. 2d 531, 552 (2007); *Nommensen v. Am. Cont'l Ins. Co.*, 246 Wis. 2d 132, 154 (2001). *Behnke* controls. *See State v. Stuart,* 262 Wis. 2d 620, 633 (2003) (describing the rule of the case doctrine).

[2] The court was concerned that Criminal Jury Instruction 2119 "was revised without reference to *Behnke*, in 2002 and 2011." (R. 57: p.1).

Consequently, the circuit court did not fully and fairly inform the jury regarding the proper law under Wis. Stat. § 48.981. *Wisconsin* trial courts are bound by *Wisconsin's* higher courts, and the Supreme Court of Indiana cannot overrule a Wisconsin court's interpretation of Wisconsin law.

c. **The circuit court erred by not instructing the jury that a mandated reporter of suspected child abuse is allowed "a reasonable amount of time to investigate abuse" prior to reporting.**

Despite Ziehr's multiple requests for proper jury instructions,[3] the circuit court did not fully and fairly instruct the jury that the "immediate" reporting of suspected child abuse by a child care worker, as required by Wis. Stat. § 48.981(3), includes "a reasonable amount of time to investigate abuse" prior to reporting. *Phillips v. Behnke*, 192 Wis.2d 552, 562 (Ct. App. 1995). Accordingly, "expending a reasonable amount of time to verify" such a damaging allegation "is consistent with the statute's requirement that such information be reported immediately." *Behnke*, 192 Wis.2d at 562.

In this case, Ziehr expended a reasonable amount of time to verify whether both the PZ-AM and the PZ-JV allegation were true prior to reporting. For the suspected PZ-JV abuse, Ziehr learned of the incident on the evening of April 9, 2013, verified that child abuse potentially occurred, and collaborated with Kim Berens to have the incident reported the next morning.

Likewise, for suspected PZ-AM abuse, once Ziehr became informed of comments made by AM, she questioned AM, Christina Gould, and PZ, to determine whether child abuse occurred. (R. 122: p. 308, 312). According to Christina Gould's statement to Ziehr that day, as well as at the trial, the alleged abuse could not have occurred since she (Gould) was present and in no uncertain terms provided that no inappropriate behavior occurred between PZ and AM. (R. 122: p. 307). When asked by Ziehr, AM made no reference to any inappropriate conduct. Further, PZ's account corroborated AM's, and Gould only recounted that AM said "touch a penis, suck a penis." A child saying "touch a penis, suck a penis" is not sexual abuse. Based upon the fact that Gould did not see sexual abuse coupled with AM's normal past usage of the word "penis," Ziehr reasonably concluded that AM's statement was simply "potty talk"—rather than child abuse. There was no reason then, and is none now, to reasonably suspect that PZ abused

[3] *See* Motion in Limine for Decision on Applicable Jury Instructions for Trial (R. 44), and Trial Transcript (R. 122: p. 29); *see also* Order Regarding Pre-Trial Filings, (R. 57).

AM. Ziehr had no duty to report child abuse which she did not reasonably suspect.

Ziehr was entitled to verify whether abuse occurred. The circuit court's failure to instruct the jury accordingly communicated an incorrect statement of law, and mislead the jury.

d. **The circuit court erred by not instructing the jury as to reporter immunity under Wisconsin Law.**

Despite Ziehr's requests,[4] the circuit court failed to instruct the jury regarding the proper reporter immunity law. Ziehr was not required to report because she either (1) caused the appropriate authorities to be notified, or (2) reasonably believed that a third person had already reported to appropriate authorities. Wis. Stat. § 48.981(4); *Behnke*, 192 Wis. at 561.

As to the PZ-JV incident, Ziehr became immune once she, in collaboration with Kim Berens, reported suspected PZ-JV abuse to authorities on April 10, 2013, the morning after Ziehr became aware of the incident. As to the PZ-AM incident, Ziehr became immune once she communicated the results of her investigation to—and was notified by—AM's mother that the incident was reported to police. Thus, Ziehr was immune from criminal liability, consistent with the holding in *Behnke*.

As explained above, the *Behnke* decision provides for just such a situation: "[I]f five school teachers obtained information that would require reporting under the statute and agreed that one of them would report the information, the teacher who actually reported the information would receive immunity. The other teachers, however, would be deprived of immunity under the statute, despite the fact that they determined a report should be made and designated a reporter. Certainly the legislature did not intend to create such an absurd result." The *Behnke* court thus concluded that Ziehr and other like-situated reporters, who report "the necessary information to one who was expected to, and did, report the information to the proper authorities" are entitled to immunity under Wis. Stat. § 48.981(4). *Id.* at 561.

The circuit court's failure to instruct the jury regarding the current reporter immunity law under Wis. Stat. § 48.981(4) fundamentally mislead the jury. Ziehr was—at a minimum—potentially immune from suit, and the

[4] *See* Motion in Limine for Decision on Applicable Jury Instructions for Trial (R. 44), and Trial Transcript (R. 122: p. 29); *see also* Order Regarding Pre-Trial Filings, (R. 57).

circuit court's failure to properly instruct the jury eliminated the possibility that the jury could consider whether Ziehr was, indeed, immune from liability.

III. EVIDENCE AT TRIAL WAS INSUFFICIENT TO PROVE THAT ZIEHR HAD REASONABLE CAUSE TO SUSPECT THAT AM WAS ABUSED.

a. Standard of appellate review

On appeal, the court may reverse the defendant's conviction based upon a lack of sufficient evidence if the evidence is "so insufficient in probative value and force that as a matter of law, no reasonable factfinder could have determined guilt beyond a reasonable doubt." *State v. Jensen,* 236 Wis. 2d 521, 532 (2000); *State v. Poellinger,* 153 Wis.2d 493, 501 (1990). In applying this test, the reviewing court views the evidence in the light most favorable to the conviction. *Jensen* 236 Wis. 2d at 532.

b. No evidence was presented at trial that Ziehr should have reasonably suspected AM's abuse.

Even if the court properly instructed the jury, the State presented no evidence that Ziehr had reasonable cause to suspect AM's abuse prior to its report. In fact, quite the opposite was presented during trial. All three people directly involved in the incident, with whom Ziehr spoke, did not observe any abuse whatsoever. What Gould, PZ, and AM did observe, however, was that AM said "touch a penis, suck a penis." The word "penis," which AM had, "on occasion," used as "potty talk" in the past, is not child abuse.

Instead, the State presented the separate **PZ-JV** "other acts" incident, in which Ziehr *did* reasonably suspect, but undisputedly reported, child abuse. This was allowed notwithstanding the fact that the State never established, and could not establish, whether the PZ-JV incident occurred before, or after, the PZ-AM incident. We do know, however, that the PZ-JV incident was not **reported** until after the PZ-AM incident came to light. The fact that the PZ-JV incident occurred has no impact on whether Ziehr had reason to suspect a different child, on a different day, under different circumstances, had been abused. Both incidents bootstrapped together, however, showed that Ziehr, albeit magically, should have divined that PZ-AM abuse occurred—despite all people involved telling her otherwise.

Further still, this case was brought by the State even though the PZ-AM incident *was* reported the next morning. AM's parents reported the incident

the morning after Ziehr informed the parents of what happened. The plain language of Wis. Stat. 48.941(4) provides that Ziehr, by conferring what she knew to AM's parents, "participat[ed] in good faith in the making of a report," and was immune from criminal liability.

For these reasons, Ziehr's conviction should be reversed and the case should be remanded to the circuit court with instructions to enter a judgment of acquittal based upon *Burks v. United States,* 437 U.S. 1 (1978).

IV. THE CIRCUIT COURT ERRED BY ALLOWING THE STATE TO SUBMIT PROOF OF TWO SEPARATE OFFENSES IN SUPPORT OF A SINGLE COUNT IN VIOLATION OF THE PROHIBITION AGAINST DUPLICITY.

a. Standard of appellate review

Duplicity is the joining of two or more separate offenses in a single count. *State v. George*, 69 Wis.2d 92, 99 (1975); *Harrell v. State*, 88 Wis.2d 546, 555 (Ct. App. 1979). "The purposes of the prohibition against duplicity are: (1) to assure that the defendant is sufficiently notified of the charge; (2) to protect the defendant against double jeopardy; (3) to avoid prejudice and confusion arising from evidentiary rulings during trial; (4) to assure that the defendant is appropriately sentenced for the crime charged; and (5) to guarantee jury unanimity." *State. v. Lomagro*, 113 Wis.2d 582, 586–87 (1983).

While the state may elect to charge separate offenses "relating to one continued transaction" when "committed by the same person at substantially the same time," they cannot do so if it would otherwise expose the defendant to any of the above-listed dangers of a duplicitous indictment. *United States v. Pavloski,* 574 F.2d 933 (7th Cir. 1978); *Huotte v. State,* 164 Wis. 354, 356 (1916); *Blenski v. State,* 73 Wis.2d 685, 695 (1976).

b. Ziehr did not have sufficient notice of which allegations the State intended to prove because the Complaint was duplicitous.

The State's criminal complaint originally alleged that at some time between March 1, and April 3, of 2013—"a few weeks before" April 10, 2013—Ziehr intentionally failed to report suspected PZ-JV abuse.[5] Through later amended criminal complaints, however, a separate incident of alleged failure to report suspected PZ-AM abuse, which occurred in "the

[5] *See* Trial Exhibit 1.

later half of March 2013," was added to the Complaint.[6] While Ziehr attempted to clarify which incident she was accused of failing to report,[7] only on the day of trial was Ziehr notified that the State was attempting to establish the PZ-AM allegation rather than the PZ-JV allegation. (R. 122: p. 11–13). Ziehr, therefore, did not have sufficient notice, and was exposed to the dangers of a duplicitous indictment.

The State's ability to cherry-pick which incident to try the morning of trial, absent prior notice to Ziehr, is fundamentally deceptive. Indeed Ziehr believed that her alleged failure to report PZ-JV abuse, which prompted the State to file their original Complaint in the first place, was the crime she was charged with. Yet, the State "elected" to try only the later-added PZ-AM incident the morning of trial. The State did so fully aware that Ziehr had undisputedly reported PZ-JV abuse, and had no case. Consequently, the State was allowed to "bait-and-switch" their way to trial victory. The State was required to, at a minimum, respond to Ziehr's numerous motions or otherwise inform Ziehr of which incident the State intended to pursue.

Moreover, the PZ-AM and the PZ-JV allegations are not part of the same "continued transaction," and when used together, expose Ziehr to the inherent dangers of duplicity. Each allegation involves different victims, different circumstances, and occurred at different times. Further, if the State did intend to charge both separate acts as part of the same "continued transaction," the State was required to, but did not, say so in response to Ziehr's requests for specificity. As a result, the use of both allegations under a single count on the criminal complaint fostered concerns otherwise protected by the prohibition against duplicity.

V. THE CIRCUIT COURT ABUSED ITS DISCRETION BY ALLOWING THE STATE TO SUBMIT PROOF OF A SECOND FAILURE-TO-REPORT ACCUSATION WITHOUT PROPER PROCEDURE, ANALYSIS, AND WEIGHING OF PREJUDICE.

a. Standard of appellate review.

The circuit court's discretionary decision in determining the relevance and admissibility of proffered evidence must be made "according to accepted legal standards and in accordance with the facts of record." *State v. Fishnick,* 127 Wis.2d 247, 257 (1985). "When a circuit court fails to set forth its reasoning, appellate courts independently review the record to

[6] *See* Trial Exhibits 4, 6, and 12.

[7] Ziehr's Motion to Dismiss (R. 54), Motion for Bill of Particulars (R. 53), Motion to Make More Definite and Certain (R. 52).

determine whether it provides a basis for the circuit court's exercise of discretion." *State v. Sullivan*, 216 Wis. 2d 768, 781 (1998). "A circuit court's failure to delineate the factors that influenced its decision constitutes an erroneous exercise of discretion." *Id.*

b. **The circuit court abused its discretion by improperly admitting "other acts" evidence.**

The circuit court admitted evidence of Ziehr's failure to report suspected PZ-JV abuse without conforming to accepted legal standards and without any comment or notice to Ziehr. PZ-JV evidence was also admitted based upon a flawed analysis under *State v. Sullivan*, 216 Wis. 2d 768 (1998). The PZ-JV incident should not have been admitted as "other acts" evidence.

Prior to admission of the PZ-JV incident as "other acts," at least *some* discussion was required as to whether suspected PZ-JV abuse was admissible as "other acts" evidence. Prior to the day of trial, Ziehr had insufficient notice that the State intended to introduce the PZ-JV incident as "other acts," and the court did not allow for argument or comment on whether or not the PZ-JV incident should be excluded.

Also, "other acts" evidence was admitted based upon a flawed *Sullivan* analysis, and improper legal standards. Under *Sullivan*, "other acts" evidence is admissible only if: (1) it is offered for a permissible purpose; (2) it is relevant; and (3) its probative value is not substantially outweighed by the risk of unfair prejudice. *State v. Marinez*, 331 Wis. 2d 568 (2011). This is known as the *Sullivan* test. *See Id.* (*citing State v. Sullivan*, 216 Wis. 2d, 772–73 (1998)). The party seeking to admit the other acts evidence bears the burden of satisfying the first two elements. *Id.* If the first two elements are satisfied, the burden then shifts to the opposing party to show that the probative value of the evidence is substantially outweighed by the risk of unfair prejudice. *Id.* Here, the State failed to satisfy the first two elements of the test. As a result, the evidence should have been excluded.

Evidence must be offered for a proper purpose. "Other acts" evidence may be offered to prove, among other things, motive, opportunity, intent, preparation, plan, knowledge, identity, and absence of mistake or accident. Wis. Stat. § 904.04(2)(b). "Other acts," however, may not be offered to prove the propensity of the defendant. *Marinez*, 331 Wis. 2d at 584.

Evidence must also be relevant. "Other acts" evidence is only admissible if both relevancy requirements of Wis. Stat. § 904.01 are adequately demonstrated. Accordingly, the State must show that the (1) other acts evidence relates to a fact or proposition that is of consequence in the determination of the action; and (2) other acts evidence makes that consequential fact or proposition more or less probable. *Sullivan*, 216 Wis. 2d at 772 (1998).

Here, the State failed to satisfy, and the court failed to analyze, the purpose and relevancy requirements necessary for the admissibility of "other acts" evidence. The State mentioned that failure to report suspected PZ-JV abuse "probably is other acts evidence" that "goes to intent and absence of mistake." (R. 122: p. 26). The court, however, disagreed, and, on its own, decided to admit the evidence for the purpose of showing "knowledge." (R. 122: p. 31). The court reasoned that Ziehr's "knowledge" (of the PZ-JV incident) and "even a lower-level suspicion" would show a "reasonable cause to form a suspicion." (R. 122: p. 31). No analysis was made, nor arguments entertained, on the State's actual proffered purposes.

Yet, while the court found that "knowledge" was the purpose of the PZ-JV incident, the jury was instructed otherwise. Prior to deliberation, the court gave a limiting instruction which indicated that evidence of the PZ-JV incident "[w]as received on the following issues. **Intent**, that is, whether the defendant acted with the state of mind that is required for the offense charged. **Absence of mistake or accident**, that is, whether the defendant acted with the state of mind required for the offense charged." (R. 122: p. 357) (emphasis added).

Not only was PZ-JV evidence admitted based upon ever-changing purposes, but evidence of the PZ-JV incident is irrelevant. Ziehr was first made aware of the PZ-JV incident on April 9, 2014—several weeks **after** the alleged March 20th, 2014, PZ-AM abuse. At the time of suspected PZ-AM abuse, Ziehr was simply not aware of the PZ-JV incident. Thus, the incident does not indicate that Ziehr was more or less likely to *intentionally* fail to report suspected PZ-AM abuse. By the same reasoning, it is implausible that the PZ-JV incident could indicate whether it was more or less likely that Ziehr *unintentionally* failed to report the suspected PZ-AM abuse by mistake. There is also no indication how the PZ-JV incident, which Ziehr and Kim Berens *did* report, can show that Ziehr *failed to report* suspected PZ-AM abuse.

Further, the court's relevancy analysis was nonexistent, and made according to the improper standard. The court simply concluded the PZ-

JV incident is "relevant to whether she had reasonable cause to suspect that knowledge" about the PZ-AM incident. (R. 122: p. 31). The court then elaborated that the PZ-JV incident would be relevant even to show that "she's a bad person. . . . She's committed other crimes. You just shouldn't believe her. You should find her guilty regardless of what the evidence—other evidence is." (R. 122: p. 31).

Had the court appropriately analyzed the introduction of the PZ-JV incident as "other acts" according to *Sullivan*, the court would have found that the State failed to satisfy the first two elements of the test. The PZ-JV incident was therefore improperly admitted as "other acts" evidence and should have been excluded.

Even if the State did satisfy the first two prongs of the *Sullivan* test, the court should have determined, under *Sullivan's* third prong, that the probative value of the PZ-JV incident was substantially outweighed by the risk of unfair prejudice to Ziehr. *Marinez*, 331 Wis. 2d at 603. "The probative value of evidence 'is a function of its relevance under § 904.01.'" *Id.* ¶41 *(quoting* Daniel D. Blinka, Wisconsin Practice Series: Wisconsin Evidence § 403.1 at 135 (3d ed. 2008)). Prejudice, on the other hand, is a function of "whether the evidence tends to influence the outcome of the case by 'improper means.'" *Id.* (quoting *State v. Payano*, 320 Wis. 2d 348 (2009)). Here, PZ-JV evidence has no probative value and the risk of unfair prejudice in its introduction to the jury was very high.

Evidence of the PZ-JV incident is irrelevant and has no probative value. The jury does not need to know of an incident which may or may not have occurred until after suspected PZ-AM abuse, and which Ziehr was not aware of when suspected PZ-AM abuse occurred. The jury also does not need to know of other instances of child abuse which Ziehr *did* report. The more allegations of child abuse the State introduces, the greater the risk of a jury conflating one situation for the other, and improperly inferring that Ziehr was attempting to "cover up" for her son. Rather than being probative to an issue in dispute, the evidence appears as an attempt to improperly inform the jury that Ziehr is some unscrupulous daycare owner, and mother, who's child routinely abuses other children attending daycare.

The risk of prejudice, however, was extremely high. Allowing into evidence other incidents where PZ, Ziehr's son, acted inappropriately, creates the impression that Ziehr as a mother is attempting to conceal her son's misconduct. Thus, the PZ-JV incident, which Ziehr did report,

allows the jury to decide the current case on improper means. Introduction of the PZ-JV incident also allows the jury to conclude that because multiple instances of suspected child abuse have allegedly occurred at a daycare center Ziehr owns, she is a bad person, and is more likely to fail to report them. These inferences are unfairly prejudicial to the defendant. As such, the unfair prejudice to the defendant substantially outweighs the probative value of the other acts evidence and the evidence should have been excluded.

The State and court ran roughshod over *Sullivan's* admissibility requirements. The PZ-JV incident was admitted only after inadequate analysis under the test, according to the incorrect legal standards, and without opportunity for notice or comment by Ziehr. As such, admission of the PZ-JV incident into evidence was highly prejudicial and merits relief.

c. **The State improperly used "other acts" evidence in closing statements.**

During closing statements, the prosecutor improperly used evidence of the PZ-JV incident to show that Ziehr had a greater propensity to fail to report alleged PZ-AM abuse. Prior to trial, the court ruled that the PZ-JV incident was admissible only to show Ziehr's "knowledge." (R. 122: p. 31). However, the jury was otherwise instructed (absent any discussion between the parties) prior to closing statements, that the incident could instead be used to show intent and mistake. (R. 122: p. 357). The prosecutor then argued the following during closing statements:

> And we know that she didn't somehow miss [sic] a mistake, because we know that a few weeks later another parent called up, and **she didn't do anything different then. Didn't report anything then either. She was obligated to do so.**
> Were her actions understandable? On some level is it tough to **put this burden on a mother to report her own child, I'm sure it is.** But you take a lot of responsibilities when you assume certain positions of responsibility in this world. And in this context she had to just simply divorce herself from the situation and do what she was easily obligated to do, call up the police and say I can't deal with this. Here's what they're telling me. You take it from here. **She didn't. And that's why you must find her guilty.**

(R. 122; p. 369) (emphasis added). The prosecutor's argument was improper for two reasons.

First, the prosecutor used the PZ-JV incident as a clear indication that Ziehr was inclined to fail to report child abuse when it involved her daycare, or her son. The prosecutor clearly asserted that Ziehr was more likely to have failed to report the PZ-AM allegations because she also failed to report the PZ-JV incident. The prosecutor also indicated that Ziehr's failure to report allegations of PZ-JV abuse and PZ-AM abuse were the result of her motherly inclinations to protect her own son. Both of the prosecutor's statements went beyond the permissible purpose of the PZ-JV "other acts" evidence, and improperly used the PZ-JV incident as propensity evidence.

Second, the State's assertion that Ziehr failed to report the PZ-JV incident is simply untrue. Ziehr *did* report allegations of PZ-JV abuse in collaboration with the daycare license holder Kim Berens the morning after allegations surfaced. Discussion immediately preceding trial made clear that Ziehr was only on trial for failing to report PZ-AM abuse. Ziehr was never charged or otherwise convicted of failing to report PZ-JV allegations. The prosecutor therefore mislead the jury by improperly asserting that Ziehr failed to report the PZ-JV "other acts" incident contrary to facts of record.

For both of these reasons, the prosecutor's improper references to the PZ-JV incident infected "the trial with unfairness as to make the resulting conviction a denial of due process." *See State v. Mayo,* 301 Wis.2d 642 (2007); *State v. Marinez*, 331 Wis. 2d 568, 575–76 (2011).

CONCLUSION

For the reasons set forth in this brief, the defendant-appellant believes that the defendant-appellant's conviction was made in error. As such, the defendant-appellant respectfully requests the Court of Appeals reverse the decision of the Trial Court and remand the matter to the Trial Court for either a new trial, or to direct the Trial Court to enter a judgment of acquittal.

Dated at Milwaukee, Wisconsin this 22 day of June, 2015.

Respectfully submitted,

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CERTIFICATION OF APPENDIX

I hereby certify that filed with this brief, either as a separate document or as part of this brief, is an appendix that complies with § 809.19(2)(a) and that contains, at a minimum: (1) a table of contents; (2) the findings or opinions of the circuit court; and (3) portions of the record essential to an understanding of the issues raised, including oral or written rulings or decisions showing the circuit court's reasoning regarding those issues.

I further certify that if this appeal is taken from a circuit court order or judgment entered in a judicial review of an administrative decision, the appendix contains the findings of fact and conclusions of law, if any, and final decision of the administrative agency.

I further certify that if the record is required by law to be confidential, the portions of the record included in the appendix are reproduced using first names and last initials instead of full names of person, specifically including juveniles and parents of juveniles, with a notation portion of the record have been so reproduced to preserve confidentiality and with appropriate references to the record.

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CERTIFICATE OF COMPLIANCE WITH RULE 809.19(12)

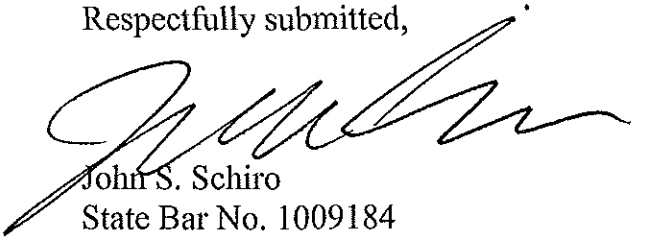
I hereby certify that:

I have submitted an electronic copy of this brief, excluding the appendix, if any, which complies with the requirements of § 809.19(12). I further certify that:

This electronic brief is identical in content and format to the printed form of the brief filed as of this date.

A copy of this certificate has been served with the paper copies of this brief filed with the court and served on all opposing parties.

Respectfully submitted,



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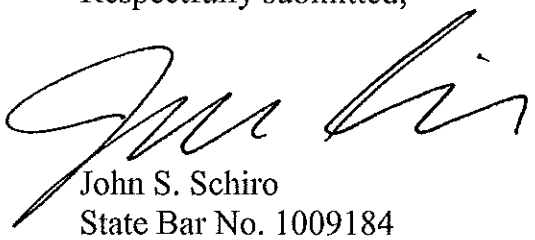
CERTIFICATION OF FORM AND LENGTH

I certify that this brief meets the form and length requirements of Wis. Stat. §§ (Rules) 809.19(8)(b) and (c) in that it is: proportional serif font, minimum printing resolution of 300 dots per inch, 13-point body text, 11-point for quotes and footnotes, leading of minimum 2 points and maximum of 60 characters per line. The text is 13-point type and the length of the brief is 10,992 words.

Respectfully submitted,



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